

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTONIO MOGROS,

Defendant.

Case No. 3:16-cr-00051-MMD-VPC

ORDER

I. SUMMARY

Defendant Antonio Mogros (“Mogros”) was charged with three counts related to the possession of a firearm and possession with intent to distribute controlled substances after police executed a search warrant on his motel room. (ECF No. 4.) Before the Court is Mogros’ Motion to Suppress (“Motion”). (ECF No. 17.) The government filed a response (ECF No. 24) to which Mogros replied (ECF No. 30). The Court held an evidentiary hearing on January 31 and February 3, 2017 (“Hearing”). (ECF Nos. 41, 43.) The Court also allowed the parties to submit post-hearing briefs summarizing their arguments. (ECF Nos. 48, 49.) After the first day of the Hearing, Mogros filed a Motion to Disclose Confidential Informant’s File. (ECF No. 42.) The government filed a response to this motion (ECF No. 51) and Mogros filed a reply (ECF No. 52). For the reasons discussed herein, both motions are denied.

II. RELEVANT FACTUAL BACKGROUND

The following facts are taken from the exhibits attached to the briefing relating to the Motion and the evidence presented at the Hearing.

1 **A. The Tip and Setup**

2 On August 15, 2016, detectives with the Regional Crime Suppression Unit
3 (“RCSU”) — a multi-agency law enforcement program housed at the Sparks Police
4 Department — arrested Christopher Wilkins. Wilkins, who was wanted for burglary, had
5 been convicted of three other theft-related felonies and admitted to using
6 methamphetamine and heroin daily. (ECF No. 24-1 at 7.) In an effort to help himself,
7 Wilkins told Detective Tindall that his supplier was a short Hispanic man named Antonio.
8 (ECF No. 24-1 at 7.) Detective Tindell, who was familiar with Antonio Mogros, showed
9 Wilkins a picture of Mogros and asked if he was the man to whom Wilkins was referring.
10 (*Id.*) Wilkins confirmed that Mogros was the man from whom he purchased
11 methamphetamine and heroin over the last few months. Wilkins also informed Detective
12 Tindall that Mogros was staying at the Aloha Inn (“Aloha Inn” or “Motel”) — a motel in
13 Sparks. (*Id.*) Another RCSU detective called the Aloha Inn and confirmed that Mogros
14 was staying there and was registered to room #334. (*Id.*)

15 Detective Tindall and the other members of the RCSU devised a plan for what they
16 call a “Narcotic Rip.” The plan involved having Wilkins call Mogros to set up a sale while
17 detectives monitored the Aloha Inn. (*Id.* at 7-8.) Then, before Mogros reached the point
18 where the sale was to take place, he would be stopped and arrested by RCSU.

19 After members of RCSU arrived at the Aloha Inn and began observing room #334,
20 Detective Tindall had Wilkins call Mogros and listened in on the call. Mogros answered
21 and Detective Tindall recognized his voice because he had heard Mogros on a number
22 of previous occasions. Mogros agreed to sell Wilkins one ounce of methamphetamine
23 and one ounce of heroin. He told Wilkins to come to his room at the Aloha Inn, which he
24 identified as room #334. (*Id.* at 8.) Wilkins then ended the call. Detective Tindall informed
25 Wilkins that RCSU wanted to lure Mogros away from the Motel, and had Wilkins call back.
26 After a few calls back and forth, Mogros agreed to meet Wilkins at the Nugget Casino
27 (“the Casino”) in Sparks. (*Id.*)

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1 **B. Surveillance and Arrest**

2 Detective Tindall informed the RCSU members who were positioned outside of the
3 Aloha Inn about the deal. (*Id.*) About ten minutes after the call, the RCSU detectives
4 observed Mogros leave his motel room and walk to a local convenience store. (*Id.* at 9.)
5 A green Lincoln eventually pulled up to the convenience store, and after talking to the
6 driver and heading back into the store momentarily, Mogros entered the vehicle. The
7 Lincoln drove back to the Aloha Inn and the driver and Mogros exited the car and entered
8 room #334. After several minutes, the two left room #334 and walked back to the Lincoln.
9 (*Id.*) The Lincoln left the Aloha Inn and headed west on the freeway, in the general
10 direction of the Casino.

11 Detective Tindall contacted Detective Bare and requested that he pull over the
12 Lincoln. At this point, Detective Tindall testified that he believed that probable cause
13 existed to arrest Mogros for the drug sale and had planned to arrest Mogros after the
14 vehicle was stopped. Detective Bare ran the vehicle's plates and discovered the
15 registration had been suspended. (ECF No. 42-2 at 3.) He followed the vehicle as it exited
16 the freeway near the Casino, and turned north on Pyramid way, heading away from the
17 Casino. The Lincoln then turned onto another street, and Detective Bare activated his
18 emergency lights. (*Id.*) The Lincoln sped up momentarily and turned onto another street,
19 before pulling over and stopping quickly. Officer Bare believed this behavior indicated that
20 the occupants were either hiding contraband or preparing to ambush or flee. (*Id.*)
21 Detective Bare exited his car and approached the Lincoln. He confirmed Mogros was in
22 the passenger seat, drew his firearm, and ordered both Mogros and the driver to exit the
23 vehicle with their hands up. (*Id.*) Detective Bare handcuffed Mogros and performed a pat
24 down search. While patting down the area around Mogros' groin, Detective Bare felt
25 "packaging material" filled with "a rock like material." (*Id.* at 4.) Detective Bare asked
26 Mogros what the object was and Mogros responded "my dick." (*Id.*)

27 At some point after Detective Bare pulled over the Lincoln, Detective Tindall had
28 arrived on the scene. After discovering the suspected material on Mogros, Detective Bare

1 handed him over, still in cuffs, to Detective Tindall. Detective Bare informed Detective
2 Tindall that he suspected Mogros had a bag of crystal meth in his groin area. (*Id.*)
3 Detective Tindall did not advise Mogros of his *Miranda* rights, but said something along
4 the lines of “man up and tell me what it is.” In response, Mogros told Detective Tindall that
5 he had a bag of methamphetamine and a bag of heroin.¹ (*Id.*) According to Detective
6 Tindall, Mogros then gave him permission to retrieve the drugs. (ECF No. 24-1 at 10.)
7 Detective Tindall unbuttoned Mogros’ pants and found three plastic bags in a sleeve in
8 Mogros’ boxer-briefs. One bag contained about 29 grams crystal meth, and the other two
9 contained a combined 31 grams of heroin. (ECF No 24-1 at 10.) Detective Tindall also
10 found \$1,395 in the pocket of Mogros’ jeans and a piece of paper which Detective Tindall
11 believed to be a “pay/owe sheet” — a record of debts and payments from his contraband
12 sales. (*Id.*) The detectives decided to call for the vehicle to be towed based on the fact
13 that it was being used in the commission of a felony. (*Id.* at 11.) They searched the vehicle
14 and found an additional 18.9 grams of methamphetamine and .6 grams of heroin. (*Id.*)
15 The detectives arrested Mogros and the driver for trafficking, possession for sale, and
16 possession of a controlled substances. (*Id.*)

17 **C. Search of Motel Room**

18 Several of the detectives went to the Aloha Inn, where Detective Gott had been
19 conducting a surveillance on room #334. One of them asked the management of the
20 Motel for permission to perform a canine search, and the management granted
21 permission. Detective Bare took his canine, Jamie, to the third floor walkway. Jamie
22 sniffed at the doors of rooms around room #334. When she reached room #334, her
23 behavior changed and she began sniffing intently at the bottom of the door and the air
24 conditioning unit. She then gave a final response by sitting, looking at the door to room
25 #334, and looking back at Detective Bare. (ECF No. 24-2 at 4.)

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28 ¹The government concedes that Mogros’ statement was obtained in violation of his
Miranda rights and does not seek to admit his statement. (ECF No. 24 at 9 n. 2.)

1 At 9:37 PM, after the canine alert was relayed to him and with information gathered
2 over the day and obtained from Mogros' arrest, Detective Gott called a deputy district
3 attorney to start the search warrant application process. The deputy district attorney did
4 not answer, so Gott left a voicemail message. (ECF No. 24-3 at 3.)

5 Around the same time, a car pulled into the Motel parking lot and a woman got out
6 and began to walk towards room #334. (ECF No. 24-2 at 5.) The detectives became
7 worried that the woman would attempt to contact anyone who had remained in #334 and
8 alert that person of their presence.² (ECF No. 24-1 at 12.) They decided to knock on
9 the door to room #334.

10 The detectives' accounts of the next few moments are not entirely consistent.
11 Generally, a woman, Cassandra Hutton, answered and Detective Bare removed her from
12 the room, leaving the door open behind her.³ The remaining detectives were able to see
13 into the room and allege that they saw drugs, the handle of a firearm, and various items
14 related to the sale of controlled substances. The detectives performed a protective sweep
15 of the room and secured it while Detective Gott contacted the deputy district attorney and
16 proceeded to telephonically testify in support of a search warrant to a Justice of the
17 Peace. (ECF No 17-2.) The Justice of the Peace granted the warrant, and the detectives
18 entered the room and found a handgun, ammunition, heroin, methamphetamine,
19 marijuana, a scale, a pay/owe sheet, and various other items. (ECF No. 24-1 at 13-14.)

20 Mogros was charged with one count of being a felon in possession of a firearm,
21 one count of possession with intent to distribute a controlled substance, and one count of
22 possessing a firearm in furtherance of a drug trafficking crime. (ECF No. 1.) Mogros now

23
24 ²Detective Gott testified that he met the woman as she came back down the stairs
25 and she recognized him. He had previously arrested her for drug related charges and
credit card fraud.

26 ³Ms. Hutton testified at the Hearing, but during cross-examination, she asserted
27 her Fifth Amendment rights in response to certain questions, including whether she had
28 been using controlled substances on the day in question, whether she was aware there
were drugs in the room, and whether the content of the statement that she provided to
the detectives was accurate. Based on Ms. Hutton's refusal to answer these questions,
the government moved to strike her testimony, which the Court granted.

1 moves to suppress the evidence found during his arrest and the search of his motel room.
2 He also seeks a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978) based on alleged
3 inaccuracies and misrepresentations in the testimony offered to obtain the search
4 warrant.

5 **III. DISCUSSION**

6 In support of his Motion, Mogros argues that several members of RCSU violated
7 the Fourth Amendment in various ways during the events of August 15, 2016. As a result,
8 Mogros contends that much of the testimony in support of the search warrant is based on
9 illegally obtained evidence. Accordingly, the evidence derived from his arrest must be
10 suppressed and the search warrant cannot be upheld, which necessarily result in
11 suppression of the evidence obtained in room #334.

12 First, Mogros alleges a number of problems with the stop of the Lincoln vehicle
13 and search of his person. He argues that the detectives did not have a basis for
14 conducting a high risk traffic stop or performing a pat down search, and that he did not
15 voluntarily consent to turning over the drugs in his pants. Next, Mogros argues that the
16 canine search and subsequent warrantless entry into the motel room were both
17 unconstitutional.

18 In evaluating the Motion, the Court must deal with two overlapping sets of facts.
19 While evaluating the detectives' behavior on the day of the arrest, the Court takes into
20 account all of the information known by the detectives, including their observations that
21 day and their knowledge of Mogros' previous activity. However, in evaluating the
22 legitimacy of the search warrant, the Court is restricted to the testimony offered in support
23 of the warrant — minus any testimony that the Court determines is based on improperly
24 obtained evidence.⁴ For the reasons discussed below, the Court finds that the drugs found

25 ⁴This means that in evaluating the search warrant, the Court must disregard certain
26 facts which might support a probable cause determination, but were never presented to
27 the Justice of the Peace. See *United States v. Taylor*, 716 F.2d 701, 705 (9th Cir. 1983)
28 ("The validity of a search warrant depends upon the sufficiency of what is found within the
four corners of the underlying affidavit.") In this case, the relevant facts are contained in
a transcript of testimony before a Justice of the Peace, rather than an affidavit. (ECF No.
17-2.)

1 on Mogros after the detectives pulled the Lincoln over were legally obtained and therefore
2 properly relied upon by the Justice of the Peace. The Court also finds that even absent
3 any information obtained from the canine search and the warrantless entry into room
4 #334, the testimony in support of the search warrant contained enough information to
5 justify a finding of probable cause by the Justice of the Peace — rendering it unnecessary
6 to decide the legality of the canine search or the warrantless entry.

7 **A. Arrest and Search**

8 Mogros offers two main arguments with respect to his arrest and search. First, he
9 argues that there was no basis on which to perform a pat down search, and even if there
10 was, retrieving the plastic bags from his underwear exceeded the scope of a permissible
11 search. Next, Mogros argues that the traffic stop itself was unlawfully extended in violation
12 of *Rodriguez v. United States*, 135 S.Ct. 1609, 1615 (2015). Both arguments fail because,
13 though Detective Bare identified an expired registration as the justification for the stop,
14 the detectives were also justified in pulling the vehicle over to arrest Mogros based on the
15 suspected sale of methamphetamines and heroin.

16 The Fourth Amendment prohibits unreasonable searches and seizures by the
17 government. U.S CONST. amend IV. “Warrantless searches by law enforcement officers
18 ‘are per se unreasonable under the Fourth Amendment — subject only to a few
19 specifically established and well-delineated exceptions.” *United States v. Cervantes*, 678
20 F.3d 798, 802 (9th Cir.2012) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).
21 One exception to this general rule is a search made incident to a lawful arrest. *Arizona v.*
22 *Gant*, 556 U.S. 332, 338 (2009). This exception allows “a police officer who makes a
23 lawful arrest [to] conduct a warrantless search of the arrestee's person and the area
24 ‘within his immediate control.’” *Davis v. United States*, 564 U.S. 229, 232 (2011) (citing
25 *Chimel v. California*, 395 U.S. 752, 763 (1969)). Among the permissible purposes of a
26 search incident to arrest is to “prevent concealment or destruction of evidence.” *United*
27 *States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004). In contrast to a pat down based on
28 officer safety, it can “involve a relatively extensive exploration of the person.” *Terry v.*

1 *Ohio*, 392 U.S. 1, 25 (1968). A search incident to arrest may precede a formal arrest if
2 the arresting officers have probable cause to arrest a suspect and the formal arrest follows
3 quickly. *Id.*; see also *United States v. Powell*, 483 F.3d 836, 839 (D.C. Cir. 2007) (collecting
4 similar holdings from other circuits).

5 “Probable cause for a warrantless arrest exists if under the totality of the facts and
6 circumstances known to the arresting officer, a prudent person would have concluded
7 that there was a fair probability that the suspect had committed a crime. *United States v.*
8 *Fixen*, 780 F.2d 1434, 1436 (9th Cir. 1986) (internal quotations omitted). The Court
9 agrees that the officers had probable cause to arrest Mogros when they pulled over the
10 car. At that time, they knew that Mogros had been identified by Wilkins, Detective Tindall
11 had listened to the phone conversations between Wilkins and Mogros wherein Mogros
12 agreed to sell Wilkins methamphetamines and heroine, detectives had observed Mogros’
13 motel room and seen several people approach and leave in a short amount of time
14 (behavior they believed was consistent with drug sales), and Mogros left the room and
15 travelled in the general direction of the Casino after talking to Wilkins. Given these facts,
16 a reasonable person would conclude there was a fair probability that Mogros was
17 engaged in the sale of controlled substances.

18 Indeed, Detective Tindall testified that he intended to arrest Mogros for the drug
19 sale after the car was pulled over. Detective Tindall further testified that the decision to
20 pull over the Lincoln was based in part on a suspended registration but also simply on
21 Mogros’ presence in the vehicle. He went on to testify that he believed Detective Bare
22 had probable cause to search Mogros, including in the area around the crotch. Therefore,
23 the proper framework for evaluating both Detective Bare and Detective Tindall’s searches
24 of Mogros is under the search incident to arrest line of cases based on *Chimel v.*
25 *California*, 395 U.S. 752, rather than officer safety frisk line of cases based on *Terry v.*
26 *Ohio*, 392 U.S. 1. Removing the plastic bags from Mogros’ underwear falls within the
27 scope of a properly conducted search incident to arrest. See e.g. *United States v.*
28 *Thomas*, 512 F.3d 383, 387 (7th Cir. 2008) (upholding a similar search incident to arrest

1 which uncovered cocaine in a defendant's underwear and noting "a full search of the
2 person" was reasonable); *United States v. Willis*, No. 05-CR-6123L, 2006 WL 2239738,
3 at *6 (W.D.N.Y. Aug. 4, 2006) (plastic bag of cocaine found inside defendant's underwear
4 was found within the scope of a lawful search incident to arrest); *United States v. Gordon*,
5 895 F. Supp. 2d 1011, 1026 (D. Haw. 2012) (search of defendant's duffle bag and wallet
6 fell within the scope of a search incident to arrest).

7 For these reasons, the Court finds that the drugs retrieved from Mogros' underwear
8 were found lawfully during a search incident to arrest, and consequently the Justice of the
9 Peace properly relied on this fact when determining that probable cause supported the
10 issuance of the search warrant.

11 **B. Search Warrant**

12 Mogros argues that, after all of the improper evidence is removed from the
13 testimony in support of the search warrant, what remains consists of only eleven lines
14 that do not show any nexus between drug dealing and room #334, and therefore do not
15 support a probable cause finding. (ECF No. 49 at 4-7.) However, as discussed below, the
16 Court finds that Detective Gott provided enough information based solely on the evidence
17 collected up to and including the arrest and recovery of drugs from Mogros' underwear
18 for the Justice of the Peace to find probable cause to issue the search warrant.

19 Probable cause exists when the testimony in support of a search warrant shows
20 "there is a fair probability that contraband or evidence of a crime will be found in a
21 particular place." *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983). In reviewing a search
22 warrant on probable cause grounds this Court is limited to the information contained
23 within the "four corners of the underlying affidavit." *Taylor*, 716 F.2d at 705. The evidence
24 provided to the Justice of the Peace must have been "legally sufficient and reliable."
25 *Crowe v. Cty. of San Diego*, 608 F.3d 406, 434-35 (9th Cir. 2010) (quoting *Franklin v.*
26 *Fox*, 312 F.3d 423, 438 (9th Cir. 2002). If the court determines some of the evidence
27 relied upon was unlawfully collected, it must disregard that evidence. However, "[t]he
28 mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or

1 the evidence seized pursuant to the warrant.” *United States v. Vasey*, 834 F.2d 782, 788
2 (9th Cir.1987) (citing *Wong Sun v. United States*, 371 U.S. 471, (1963). Instead, the court
3 must “excise the tainted evidence and determine whether the remaining, untainted
4 evidence would provide a neutral magistrate with probable cause to issue a warrant.” *Id.*

5 Aside from any evidence obtained after the canine search of room #334, Detective
6 Gott testified to the following in support of the search warrant: 1) Wilkins identified Mogros
7 as his dealer; 2) police received an anonymous tip that Mogros was staying in room #334
8 of the Aloha Inn; 3) Wilkins and Mogros set up a deal wherein Wilkins would purchase
9 methamphetamine and heroine; 4) Mogros informed Wilkins that he had just re-upped his
10 supply; 5) officers observed Mogros leave his motel room (#334) after the deal was made;
11 6) officers stopped the vehicle Mogros was in and recovered 30 grams of meth and 31
12 grams of heroine on Mogros; 7) Aloha Inn staff confirmed room #334 was registered to
13 Mogros. (ECF No. 17-2 at 7-11.)

14 The Court finds Gott’s testimony about evidence obtained before the canine search
15 was sufficient to support the Justice of the Peace’s conclusion that there was a fair
16 probability evidence of a crime would be found in room #334. Contrary to Mogros’
17 argument, the Justice of the Peace was presented with multiple grounds on which to find
18 a nexus between the sale of controlled substances and room #334. Mogros was placed
19 in room #334 by motel staff, an anonymous tip, and detectives’ same-day observations.
20 After agreeing to sell Wilkins methamphetamine and heroin and leaving the room, Mogros
21 was arrested, and methamphetamine and heroin were found on his person. The Ninth
22 Circuit has upheld search warrants based on similar amounts of evidence. *See United*
23 *States v. Nance*, 962 F.2d 860, 864 (9th Cir. 1992), as amended (May 18, 1992) (probable
24 cause established by confidential informants indicating that defendant sold drugs from
25 home during controlled buys and was involved in extensive drug distribution). In addition,
26 Detective Gott also informed the Justice of the Peace that Mogros indicated he had just
27 re-upped — or stocked up on his inventory. All of this information adds up to create a fair
28 probability that officers would find drugs or other evidence of drug trafficking in room #334.

1 Therefore, the search warrant was properly issued and the evidence found during the
2 search of the Motel room need not be suppressed.⁵

3 **C. Franks Hearing**

4 Lastly, Mogros argues that Detective Gott's testimony in support of the application
5 for the search warrant was inaccurate and misleading, and therefore require a *Franks*
6 hearing. Specifically, Mogros argues that Detective Gott failed to adequately describe
7 Wilkins and the context of his cooperation, misrepresented the timing of the phone calls
8 between Wilkins and Mogros, inaccurately described Detective Bare's entry into the Motel
9 room and his subsequent observations, and incorrectly described the rental log for the
10 Motel room. Mogros also asks that the Court compel the government to provide Wilkin's
11 criminal history, because according to Mogros, that history was material to any probable
12 cause finding. (ECF No. 42 at 2.)

13 Defendant argues that Detective Gott was impeached several times during the
14 Hearing. Certainly Detective Gott's testimony about the entry into the room and the items
15 found in plain sight, in particular, were inconsistent with other evidence, including
16 photographs of items in room #334 and Detective Bare's testimony. However, as
17 discussed above, the Court does not find these inconsistencies, or any other omissions,
18 material to a finding of probable cause. Omissions related to Wilkins' addiction or criminal
19 history, for example, are not material because his testimony was corroborated by further
20 investigation, including monitored calls with Mogros, which was presented to the Justice
21 of the Peace.

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24 ⁵Mogros also argues that at the very least the firearm found in the room must be
25 suppressed because there was no independent probable cause relating to the gun and
26 ammunition. Even assuming, as the Court has done, that the testimony about the items
27 in plain view must be excised from the testimony offered in support of the search warrant,
28 the firearm and ammunition would still have been recovered when the officers executed
the search warrant. Therefore, whether the gun was specifically listed in the warrant or
not, it is admissible based on the inevitable discovery doctrine, which states that if, "by
following routine procedures, the police would inevitably have uncovered the evidence,
then the evidence will not be suppressed despite any constitutional violation." *United*
States v. Young, 573 F.3d 711, 721 (9th Cir. 2009) (internal quotations omitted).

1 As the government rightly argues, the added investigation here makes this case
2 distinguishable from *United States v. Hall*, 113 F.3d 157 (9th Cir.1997). In *Hall*, the only
3 connection between a suspect and criminal activity was the word of an informant. Here,
4 Wilkin's word kicked off an investigation that produced several pieces of information
5 confirming his description of Mogros as his supplier. Wilkins' criminal history does nothing
6 to change Detective Tindall's testimony about the phone calls between Wilkins and
7 Mogros, the anonymous tip and motel employee testimony confirming Mogros was in
8 room #334, or the drugs eventually found on Mogros. Therefore, under the circumstances
9 here, Wilkins' criminal history would not have been material to a probable cause
10 determination and neither a *Franks* hearing nor an order compelling the government to
11 produce his criminal history is warranted.

12 **IV. CONCLUSION**

13 The Court notes that the parties made several arguments and cited to several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines that they do not warrant discussion as they do not affect the outcome of
16 Mogros' motions.

17 It is therefore ordered that Defendant's Motion to Suppress (ECF No. 17) is denied.

18 It is further ordered that Defendant's Motion to Disclose Confidential Informant's
19 File In Camera (ECF No. 42) is denied.

20 DATED THIS 23rd day of February 2017.

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24 MIRANDA M. DU
25 UNITED STATES DISTRICT JUDGE
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